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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

EVANS K. GRIFFING, WILLIAM P. BAIN, LESTER M. ALBERTSON, WILLIAM J. LEONARD, STEPHEN F. MESCHUTT, RALPH J. OSGOOD, CHARLES R. DOMINY, ROBERT J. FLYNN, ARTHUR J. CROMARTY, and THOMAS J. HARWOOD, Constituting the Board of Supervisors of Suffolk County, New York

Appellants,

v.

I. WILLIAM BIANCHI, JR., and QUENTIN B. SAMMIS

Appellees.

On Appeal from the District Court of the United States for the Eastern District of New York

JURISDICTIONAL STATEMENT

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I. WILLIAM BIANCHI, JR., and QUENTIN B. SAMMIS

Appellees.

On Appeal from the District Court of the United States for the Eastern District of New York

JURISDICTIONAL STATEMENT

This is an appeal by Evans K. Griffing, *et al* from an Opinion and Order of February 1, 1965 issued by the District Court for the Eastern District of New York sitting as a three-judge statutory Court especially invoked by the provisions of 28 U.S.C. section 2281. This Statement is submitted by Appellants to

show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial federal question is presented.

OPINIONS BELOW

The Opinion of the District Court of the United States for the Eastern District of New York is reported at 238 F.Supp. 997, and is attached to this Statement as Appendix A, *infra* at page 1a. The Order of the District Court is attached to this Statement as Appendix B, *infra* at page 15a. The Opinion of the District Court (Bruchhausen, J.) is reported at 217 F.Supp. 166 and is attached to this Statement as Appendix C, *infra* at page 17a.

JURISDICTION

This suit was brought under 42 U.S.C. sections 1983 and 1988; under 28 U.S.C. sections 1343(3) and 1343 (4); and under 28 U.S.C. Sections 2201-2202 seeking a declaratory judgment as well as injunctive relief to restrain Appellants as duly elected members of the Board of Supervisors of Suffolk County, State of New York, from exercising any county function or power on the general grounds that the Charter, approved by the electorate January 6, 1958, and the County Law, were unconstitutional. The three-judge District Court was ordered by Judge Bruchhausen September 20, 1963. On February 1, 1965, the three-judge Court issued its Opinion. On March 3, 1965, the three-judge Court issued its Order. Notice of Appeal to this Court was filed April 2, 1965. The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by 28 U.S.C. section 1253. The following representative cases sustain the jurisdiction of the Supreme Court to review the judgment on appeal in this case:

Reynolds v. *Sims,* 377 U.S. 533, 12 L.Ed 2d 506, 84 S. Ct. 1362; *Lucas* v. *Colorado General Assembly,* 377 U.S. 713, 12 L.Ed. 2d 632, 84 S. Ct. 1472; *Roman* v. *Sincock,* 377 U.S. 695, 12 L.Ed 2d 620, 84 S. Ct. 1462; *Maryland Committee for Fair Representation* v. *Tawes,* 377 U.S. 656, 12 L.Ed 2d 595, 84 S. Ct., 1442; *WMCA, Inc.* v. *Lomenzo,* 377 U.S. 633, 12 L.Ed 2d 568, 84 S. Ct. 1418; *Davis* v. *Mann,* 377 U.S. 678, 12 L.Ed 2d 609, 84 S. Ct. 1453.

STATEMENT OF THE CASE

The issues on the merits raised in this appeal are of far-reaching importance to every local subdivision of state, county and municipal government throughout the United States.

The proceeding below was first brought under the statutes cited above by two residents of the Towns of Brookhaven and Huntington, County of Suffolk, State of New York, allegedly on behalf of themselves and all other taxpayers and voters of the said county in the said state against the ten Appellants here, who individually are the supervisors of the ten towns from which they are elected and collectively comprise the Board of Supervisors of Suffolk County, which is the governing body of the county. The complaint charged, among other things, that the Suffolk County Charter, overwhelmingly approved by the voters on January 6, 1958, as well as the County Law of the State of New York, were unconstitutional because (1) votes cast by supervisors in their function as the county governing body did not fairly reflect population proportion in the county, and (2) the votes of the inhabitants of the more populated areas of the towns are not accorded equal weight as compared to those of the repre-

sentatives from the less populated towns. The complaint alleged further that upon the basis of the undisputed facts the constitution of the present legislative body for the county is not representative of the voters of the county under the Fourteenth Amendment to the Constitution of the United States. Appellants first filed a motion to dismiss the complaint on the ground, among others, that there was no substantial federal question involved in the manner of electing local officials at the town and county level. The U.S. District Court for the Eastern District of New York in *Bianchi* v. *Griffing,* (217 F.Supp. 166, 1963) denied Appellants' motion without prejudice to renewal before a three-judge U.S. District Court. Such a Court was convened, and after a motion to dismiss was heard and filed, on February 1, 1965, an Opinion adverse to both parties was rendered. Appellants' motion to dismiss the complaint and an injunction prayed by the Appellees, Plaintiffs below, were denied and no relief to either side is evident in the Opinion of the three-judge District Court from which this appeal has been noted. The Court retained jurisdiction.

Appellants contended, *inter alia,* as they contend in this appeal, that there is no substantial federal question; indeed, Appellants are in the anomalous position of asking the Supreme Court to note probable jurisdiction for the purpose of urging upon the Supreme Court that it overrule the judgment rendered by the three-judge Federal Court in that the three-judge Federal Court erroneously saw a substantial federal question where none existed.

THE QUESTIONS BEFORE THE SUPREME COURT ARE SUBSTANTIAL

Appellants must first discuss the question of the Supreme Court's jurisdiction on this appeal.

Whether or not the Supreme Court may take jurisdiction of a case solely for the purpose of correcting a jurisdictional error of the lower court seems to be well settled by *United States* v. *Corrick,* 298 U.S. 435 (1936). This case held that in an appeal from a three-judge District Court the Supreme Court would have jurisdiction for this limited purpose. Subsequent citations of the *Corrick* rule by the Court have not altered or diminished the holding. *Eichholz* v. *Public Service Commission of the State of Missouri,* 306 U.S. 268 (1939); *Mayo* v. *Lakeland,* 309 U.S. 310, (1940); *Magnolia Petroleum Co., et al* v. *Thompson,* 106 F.2d 217 (1939). *Corrick* is distinguishable from this case in that the lower court there had in fact enjoined the Appellants from performing certain acts; thus in *Corrick* there was no question but the Appellant was an "aggrieved" party and that the lower court's order was final and appealable.

We now face the problem as to whether or not the decision in this case, where there has been no injunction ordered and where Appellants' motion to dismiss on the ground of the lack of federal jurisdiction was denied, constitutes the kind of order which under section 1253 would permit appeal. In general, the rules provide that Appellant must be both "aggrieved" and subject to a "final" order. The Supreme Court has held that the right to review on a question of jurisdiction is subject to prior "final" judgment. *Toledo Railways and Light Co.* v. *Hill,* 244 U.S. 49 (1917). The Court further has held that a judgment is final

for purposes of appeal when it terminates the litigation between the parties on the merits of the case and leaves to be done only the enforcement by execution of what has been determined by the Court. *Parr* v. *United States*, 351 U.S. 513 (1956). Appellants are "aggrieved" inasmuch as they did not secure the full relief sought before the three-judge District Court, that is, a disposition of the case on its merits. On the other hand, it seems equally clear that the Opinion of the three-judge District Court is not the type of final order that is generally appealable.

Obviously, neither party secured the relief it sought. The Court took and retained jurisdiction and issued an Opinion in which it fairly can be said to have adopted the view that it intends to stand by and wait for instructions from its superiors on the bench, or hopefully that the appropriate state and county agencies will correct the situation. Since the legal rationale behind the requirement that an appealable order be a final one is to avoid piecemeal litigation, it follows that the appropriate time to litigate the questions on their merits would be such time as the three-judge District Court is moved again to render a judgment on the merits. However, we contend that our appeal lies under section 1253, if that statute is not regarded merely as having created an expeditious appeal procedure which circumvents the Courts of Appeal, but instead is regarded as having created a new legal right to appeal that is not governed by the usually applied principles of appealability discussed above. Thus we could say that the Supreme Court by virtue of its appellate jurisdiction under this specific statute has jurisdiction to determine whether the court below had before it a question of substantial federal nature or other concomitant jurisdiction. *Phillips* v. *United*

States, 312 U.S. 246 (1941); *ILGWU* v. *Donnelly Garment Co.,* 304 U.S. 243 (1938). Thus we find support for the proposition that the three-judge District Court's statutory language means that *any* party, "aggrieved" or not, may appeal from an order or decision whether such order or decision is "final" or not. This specific reasoning is supported in *Eichholz* v. *Public Service Commission,* 306 U.S. 268 (1939). In that case the Supreme Court, acknowledging that the decree below as not final because of the pendency of a counterclaim, still retained jurisdiction because the statute expressly authorized a direct appeal to it from an order granting or denying an injunction and there was such an order below and an appeal taken therefrom. It is notable that the forerunner of section 1253 (Judicial Code Section 266, Title 28, U.S.C.A.) at one time was written so as to include the word "final" before the word "order," but that the word "final" was eliminated by Congress at the time that section 1253 was adopted.

If a new legal area of appeal is created by section 1253 it is still difficult to apply its terms here. The statute authorizes the direct appeal "from an order granting or denying an interlocutory or permanent injunction." Obviously, Appellants cannot appeal from the denial of the injunction by Judge Moore's Court. Our appeal must lie from the *refusal* of Judge Moore's Court to render a decision against the Plaintiff on the merits. It is our position that the Court's failure to grant Appellant's Motion to Dismiss the Complaint was, for all legal purposes, equivalent to the grant of an injunction by that Court. This is not the same proposition as an appeal from an order denying an injunction. A case which is apposite is *Public Service Commission* v. *Brashear Freight Lines,* 306

U.S. 204, (1939). In this case plaintiff sought an injunction against a state agency before a three-Judge District Court. The state agency had counterclaimed for money damages. The Court denied the plaintiff's prayer for relief and likewise denied the counterclaim for money damages. The state agency then attempted to appeal directly to the Supreme Court. The Court held it had no standing to appeal because there was no action by the lower court granting or denying an injunction. The *Brashear* case is distinguishable from the case at bar and is not, we suggest, a bar to the noting of probable jurisdiction in the Supreme Court. It is our contention that the three judge statutory court was improvidently convened since action by local officers and not state officers was sought to be enjoined. In the Opinion below (Appendix A, *infra* p. 1a) the only logical inference to be drawn as to the action of the statutory court is that the court improperly retained jurisdiction and refused to rule on the merits for or against either side. Therefore, even if an injunction was neither granted nor denied, we are entitled to take this appeal.

As stated, this appeal presents the vitally important question of whether the Equal Protection Clause of the Fourteenth Amendment in respect to reapportionment extends to the lowest level of local government. This appeal further presents the important question of whether Federal District Courts under U.S. Code Title 28, section 2281 et seq. should assume jurisdiction upon a complaint such as the one involved in this case and the record presented.

It is well settled, and the Appellants do not deny that the Supreme Court of the United States has issued unequivocal rulings to the effect that as to Con-

gressional Districts within the boundaries of states and state legislatures themselves, reapportionment must take place so as not to disenfranchise large bodies of voters. *Baker* v. *Carr,* 369 U.S. 186 (1962); *Reynolds* v. *Simms,* 377 U.S. 533 (1964); *Gray* v. *Sanders,* 372 U.S. 368 (1962). These decisions were based upon the Court's reading of the Fourteenth Amendment to the U.S. Constitution under which no person may be denied the equal protection of the law with respect to his vote. Does the Fourteenth Amendment reach beyond the reapportionment of state legislatures? We contend that the District Court appears to have held that it does, and yet there is grave doubt about the meaning of this holding since the Court declined to exercise the necessary powers that would flow from such a preliminary decision. We contend that the decision that reapportionment for Suffolk County must take place does not properly involve an interpretation of the Fourteenth Amendment by a Federal Court. Malapportionment at the Suffolk County level must be corrected otherwise, if it exists. It must come from either the county itself under the Municipal Home Rule Law, from the state legislature, or as a result of an interpretation of the Constitution of the State of New York by the courts of that state.

We believe that the appeal presents serious questions of substance as to whether the District Court in its interpretation of the applicable decisions of the Supreme Court was in error in taking jurisdiction over this question, as to its apparent holding on the Fourteenth Amendment point, and whether the federal judiciary properly should concern itself with local elections, and finally, a proper interpretation of the federal judiciary's role in local municipal elections. We

further submit that neither the Federal Declaratory Judgment Act nor the Civil Rights Act cited by Appellees as grounds for its suit appropriately confer jurisdiction under the facts of this case. Accordingly, the questions are of ultimate and vital national public importance and the Supreme Court of the United States should take jurisdiction of this appeal and reverse and dismiss the suit on the ground that no substantial federal question is involved.

Article 4 Section 4 of the Constitution provides "The United States shall guarantee to every State in this Union a republican form of government, and shall protect each of them against invasion; and on application of the legislature, or of the Executive (when the legislature cannot be convened) against domestic violence."

In general, the enforcement of this constiutional guarantee is not for the courts. It is primarily a legislative power residing in Congress. *Highland Farms Dairy* v. *Agnew,* 300 U.S. 549 (1937) (Mr. Justice Cardozo). In *Highland* the Court held that distribution of power by the state among its governmental organs is commonly if not always, a question for the state. "How power shall be distributed by a state among its governmental organs is commonly, if not always, a question for the state itself. The statute is not a denial of a republican form of government. Even if it were, the enforcement of that guarantee, according to the federal doctrine, is for Congress, not the courts." *Pacific Telephone Company* v. *Oregon,* 233 U.S. 118 (1912).

Since the power thus exercised is a Congressional rather than a judicial power, the next question to be decided is what the purpose of the constitutional guar-

antee may be. In *Eckerson* v. *Des Moines,* 115 N.W. 177, 137 Iowa 452 (1908) the Court stated that "The purpose of the Federal Constitution was to provide a form of government, republican in character, for the states as a united whole, and not to control the systems of local government, and therefore, a statute is valid providing a form of municipal government which ignores the features of executive, legislative, and judicial departments and commits the functions of government to a single body." To the same effect are *State Ex Rel Porterie* v. *Smith,* 1936, 166 So. 72, 184 La. 283; *Walling North Central* v. *Texas,* 359 S.W. 2d, 546 (1962); *State* v. *Hearn,* 155 P. 1066, 59 Or. 227 (1911).

In *Reynolds* v. *Sims, supra,* Chief Justice Warren discussed claims based on an alleged violation of this constitutional clause as relating to reapportionment and stated that while such claim does not present a justiciable controversy that fact has nothing to do with the fact that those claims touch upon matters of state governmental organizations. *Baker* v. *Carr, supra,* makes it clear that in reapportionment cases the Court does not regard this constitutional clause as a valid basis for violation of state constitutions by state legislatures. It asserts the constitutional power of the Fourteenth Amendment but in no way sets aside the argument that Article 4 section 4 which guarantees a republican form of government *leaves to the states the determination of what Mr. Justice Cardozo called "the distribution by a state power among its governmental organizations."* The Supreme Court has never said the Constitution guarantees *counties* a republican form of government.

It is our contention that Article 4 section 4 is the constitutional source for the following:

1. We do not quarrel with the right of the federal judiciary to apply the Fourteenth Amendment to the malapportionment of Congressional Districts.

2. We do not quarrel with the right of the federal judiciary to apply the Fourteenth Amendment to the reapportionment of state legislatures.

3. We do find in the guarantee of a republican form of government and in the language of Mr. Justice Cardozo a persuasive argument that below the level of Congressional Districts and State Legislatures, the states have a useful basis for acting where states can best serve their own needs. If what they do is in violation of the federal constitution there are ample remedies available.

The present posture of our case, therefore, as it relates to the role of the Federal Government approved in *Highland Farms, supra,* is whether while action at the state level is pending (there are several cases upon appeal in the state courts as yet unreported and a number of amendments relating to county apportionment in the New York State Legislature) the courts should inject themselves in contravention of the normal rules governing federal-state relations. More explicitly, the federal court must, as Mr. Justice Cardozo says in *Highland Farms, supra,* where a statute is not a denial of a republican form of government, take state statutes as they find them unless there is a clear violation of the federal or state constitution. It seems apposite that there is a potential violation of Article 4 section 4 in our case, if the decision below is allowed to stand.

If the purpose of the federal constitution is not to control the systems of local government because the federal government guarantees to each state a repub-

lican form of government, then the federal judiciary should not be called upon to apply the Fourteenth Amendment to every local ordinance involving voting rights. If the doctrine of *de minimis* means anything it ought to be applied here. Nor should the federal judiciary become involved in the apportionment of the hundreds of thousands of cities, towns and villages and in addition, in the hundreds of thousands of state and local agencies which exercise legislative or quasi legislative functions. Unless this view is adopted the federal judiciary will entend its supervisory powers under the Fourteenth Amendment to civil service commissions, welfare boards, public health boards, zoning boards, and such other local legislative and administrative bodies. This is certainly a result not contemplated nor required by the Constitution. If it is assumed that the standard of "one man-one vote" must apply at every level of government, we must take the position that the application of such a principle is for the state judiciary, the state legislature and the state executive. The Supreme Court itself doubtless did not have this standard in mind for counties.

In *Brouwer* v. *Bronkema,* No. 1885 Circuit Court, Kent County, Michigan (Sept. 11, 1964) the first case heard in a state court after *Reynolds* v. *Sims,* supra, the Circuit Judge of Kent County, Michigan, relying on *Gomillion* v. *Lightfoot,* 364 U.S. 339 (1960) arrived at a decision which leaves unanswered the pressing questions raised by this appeal. The Court in *Brouwer,* supra, reasoned that there being no fundamental difference between state and municipal legislative bodies under the Equal Protection Clause a malapportioned county must be reapportioned under the doctrine of *Reynolds, supra.* The trouble with this easy transference is this: let us assume that whether

by state action or under the necessities of the Supreme Court's rulings, a state legislature has been reapportioned under a plan which meets the tests imposed by the Court under the Fourteenth Amendment. Let us assume further that a reapportioned legislature delegates some of its legislative functions to a political subdivision, such as the county here involved. Next, add the following alternate assumptions:

1) The County Board of Supervisors is malapportioned.

2) The County Board of Supervisors is reapportioned on a population basis by an act of the legislature.

3) The County Board of Supervisors is reapportioned on a population basis by its own affirmative act (such as the adoption of a "weighted-vote" plan.)

4) The County Board of Supervisors is reapportioned on a population basis by an election held under charter referendum.

5) The County Board of Supervisors exercises the delegated legislative functions of a malapportioned state legislature.

Where does this lead? It is our position that a *state legislature, such as* the New York Legislature, *that is legally apportioned according to a population basis* and whose composition meets the tests of the Equal Protection Clause has the *sole constitutional authority to see to it that it delegates its legislative functions, reserved to it by the Tenth Amendment.* The federal courts ought not and cannot do more than to order reapportionment of that body, the legislature, which

exercises all powers reserved to the state by the Tenth Amendment, including the exercise or delegation of such reserved powers. If such is the case, why should a different result obtain merely because the New York Legislature saw fit to grant a measure of home rule to Suffolk County? For example no one could successfully contend that the Fourteenth Amendment of the United States Constitution—bearing in mind the powers reserved by the Tenth Amendment of the Constitution—requires that a properly apportioned state legislature *must* delegate powers to its political subdivisions in *any* particular manner. For further example, a properly apportioned New York State Legislature could constitutionally provide that such powers—legislative, administrative, fiscal—as it saw fit to give the County of Suffolk, might be exercised by an appointive official or body.

The legal rationale for this proposition is that in the case at bar, the judicial and legislative remedies available under the laws of New York, as shown below, are adequate, plain, speedy and available to Appellees.

Ample legal precedent for the soundness of this argument is to be found in an analogous field, that is, the relationship between the federal courts and state taxing authorities. Section 267 of the Judicial Code, (now cited as 28 U.S.C. 384) provides that suits in equity shall not be sustained in the federal courts "in any case where a plain, adequate, and complete remedy may be had at law."

In *Matthews* v. *Rodgers*, 284 U.S. 521 (1932) at page 524, the Court said: "The scrupulous regard for the rightful independence of state governments which should at all times actuate the federal courts, and a proper reluctance to interfere by injunction with their

fiscal operations, require that such relief should be denied in every case where the asserted federal right may be preserved without it." Mr. Justice Douglas in *Hillsborough Township* v. *Cromwell*, 326 U.S. 620 (1946) commenting upon the law, stated: "Where the remedy at law is 'plain, adequate, and complete,' it is the one which must be pursued *even for the protection of any federal right.*" (emphasis supplied.) In reviewing the implication of the Equal Protection Clause of the Fourteenth Amendment Mr. Justice Douglas had occasion to distinguish *Great Lakes Dredge and Dock Co.* v. *Huffman*, 319 U.S. 293 (1943), which held that the policy leading federal courts to refrain from using the extraordinary powers of equity should likewise be exercised. The Court's discretion in that case withheld relief under the Federal Declaratory Judgment Act, which is one of the alleged jurisdictional grounds upon which the Appellees in the case at bar based their complaint in the lower court. The Supreme Court held in *Hillsborough Township, inter alia,* that the Equal Protection Clause protects a citizen from state action which selects him out for discriminatory treatment. The right, the Court said, which the citizen has under the Fourteenth Amendment is the right to equal treatment but the remedy is a legal rather than an equitable one, and the legal remedies must be exhausted.

Furthermore, *Hillsborough Township, supra,* held that where a federal Constitutional question turns on the interpretation of local law and the local law is in doubt, the proper procedure is for the federal court to hold the case until a definite determination of the local law can be made by the state courts. *Railroad Commission of Texas* v. *Pullman Co.*, 312 U.S. 496 (1941); *Chicago* v. *Fieldcrest Dairies,* 316 U.S. 168

(1942); *Spector Motor Service Inc.* v. *McLaughlin*, 323 U.S. 101 (1944). *Hillsborough Township*, Mr. Justice Douglas points out, involved a situation in which it was "clear that there was available a state remedy to which the complainant could resort on the remand of the cause." There are pending in the courts of New York actions brought to determine the meaning of statutes providing legislative and judicial remedies for malapportionment.

Leaving the matter of proper county apportionment to the case by case federal court determination "represents an abnegation of legislative responsibility and places an unfair and undesirable burden on the judiciary." (Weinstein, *"The Effect of the Federal Reapportionment Decisions on Counties and Other Forms of Municipal Government."* Columbia Law Review, January, 1965, Vol. 65, No. 1, page 24.)

In New York, counties are delegated legislative powers by acts of the legislature as it sees fit. When one examines the total extent of legislative power in the hands of the Board of Supervisors of Suffolk County it will be found that it exercises no taxing power, no zoning power, and does not even have control of all the funds expended by it. In such a situation it is difficult to see how jurisdiction exists for the federal courts.

The cases decided by the Supreme Court cited herein on reapportionment hold only that when a state unit is controlled by voters all voters must be treated as equally as possible. They did not hold that every state unit of government needs to be in charge of elected officials nor that agencies exercising delegated legislative or quasi-legislative functions need be reapportioned to a "one man-one vote" standard.

Closing this argument, the theory of local government must be that the administration of the affairs of a county or a city is more akin to the conduct of a business corporation than it is to that of the government of a state. Unless this theory were true and in practice followed in almost every county and municipality in the United States we would have the cumbersome spectre of the federal analogy applied to every unit of local government. Since Chief Justice Warren rejected the federal analogy in *Reynolds* v. *Sims, supra,* and in the other major apportionment cases, we can assume that the Constitution does not mean a senate and assembly for every local government. If this assumption is correct, then the next logical question to be answered is whether in fact the Constitution taken as a whole can be interpreted to invite "one man-one vote" rules in such an impractical manner.

Should the District Court Below Have Ruled That Appellees Had a Plain and Adequate Remedy at Law?

Appellants frankly concede that properly reapportioned state legislatures must follow this Court's rulings. We have conceded from the outset that the Suffolk County Board of Supervisors do not vote in accordance with numerical representation of town voters. The fact of disparity is accepted. However, it is our position that adequate remedies are available to Appellees outside the federal judiciary system. These remedies exist under the present law and have existed in New York State for many years. The legal machinery is provided for and the task can be accomplished efficaciously on the local level. Wherein should the federal judiciary invoke its extraordinary equity powers to enjoin county officers, assuming *arguendo* that it has such powers?

We have surveyed the leading cases in the Supreme Court on reapportionment. Our study shows that the Court has provided an appropriate remedy only upon its decision that there is no adequate remedy available to the under-represented petitioners. Especially in cases of racial discrimination against voters has the Supreme Court extended more than its usual equitable consideration. In cases involving racial discrimination against voters the Supreme Court has shown it will not be restrained by the doctrine of abstention or any other doctrine, and it will act whether there is a remedy at law or not.

We contend that there being no element of racial discrimination in the case at bar, there being far-reaching, significant and useful remedies of a judicial and legislative nature, the Court's role in the present dispute is one of necessary judicial restraint involving a careful look at the remedies sought to be invoked. In previous reapportionment cases, as stated, the Supreme Court invoked its equity powers to order corrective action at a local level of government only where racial discrimination against a class of citizens was practiced as a result of state and county laws. The Supreme Court has never extended its equity powers against the *"invidious discrimination" present at the local level of government where there was no racial discrimination nor any emergency reason why adequate remedies at state law could not be used.*

A. Reapportionment cases in which an absence of an adequate remedy at law was noted:

1. *Baker* v. *Carr, supra* (footnote 14 at page 193: "There is no provision for popular initiative in Tennessee.")

2. *Reynolds* v. *Sims, supra* (at page 533: "No effective political remedy to obtain relief against alleged malapportionment of the Alabama legislature appears to have been available. No initiative procedure exists under Alabama law.")

3. *WMCA* v. *Lomenzo, supra* (at page 653: "No effective political remedy to obtain relief . . . and no judicial relief in the state courts to remedy the alleged malapportionment was presumably available.")

4. *Maryland Committee for Fair Representation* v. *Tawes, supra* (page 658: "Maryland law makes no provision for the initiation of legislative or constitutional amendments by the people.")

5. *Davis* v. *Mann, supra* (at page 689: "No effective political remedy . . . no initiative procedure is provided for under Virginia law.")

6. *Roman* v. *Sincock,* supra (at page 706: "No initiative and referendum procedure exists in Delaware.")

7. *Lucas* v. *Forty-Fourth General Assembly of Colorado, supra* (footnote 3 at page 716: "Plaintiffs did not have adequate, speedy and complete remedy.")

B. The following cases all involved clear racial discrimination designed to prevent citizens of the Negro race from voting; therefore, adequacy of the state remedies was not discussed by the Supreme Court, or it was totally ignored because of the outrageous circumstances involved:

Giles v. *Harris,* 189 U.S. 475 (1903); *Nixon* v. *Herndon,* 273 U.S. 536 (1927); *Smith* v. *Allwright,* 321 U.S. 649 (1944); *Gomillion* v. *Lightfoot,* 364 U.S. 339 (1963); *Gray* v. *Sanders,* 372 U.S. 368 (1962); *Wesberry* v. *Sanders,* 376 U.S. 1 (1963); *Wright* v. *Rockefeller,* 376 U.S. 52 (1964).

C. In one case, although outrageous circumstances were present involving racial discrimination against a class of voters, the question as to the adequacy of the remedy at law was discussed in *Lane* v. *Wilson,* 307 U.S. 268 at page 274 (1939):

"Normally the state legislative processes sometimes exercised through the administrative powers of the state court must be completed before resort to the federal courts can be had."

D. In the following cases the question of the adequacy of the remedy at law or at the state judicial and/or legislative level was discussed without the outrageous circumstances of racial discrimination:

In *Colegrove* v. *Green,* 328 U.S. 549 (1946), there appears at page 552 the following: "The basis for the suit is not a private wrong but a wrong suffered by Illinois as a polity." In *Glass* v. *Hancock County,* (1963) the appeal was dismissed by the Supreme Court (378 U.S. 588), but the Supreme Court of Mississippi pointed out that the Mississippi Code provided for a complete and adequate remedy at law for the denial of the rights complained of (156 So. 2d 825 at page 830).

It is clear that without outrageous circumstances present the Supreme Court has consistently searched the record in reapportionment cases for the absence of adequate remedies at law which would justify the invoking of federal equity jurisdiction under the Fourteenth Amendment.

Under the present law, Suffolk County could, subject to mandatory referenda, reapportion its Board of Supervisors by amending its charter to provide for elections at large for an apportionment. The Board

itself could institute a temporary system of weighted voting, fractional voting, or a combination of such alternatives, subject to approval by the voters at mandatory referenda. An amendment to the Municipal Home Rule Law for Suffolk County and all other charter forms of county government is presently being considered by the New York legislature. We invite the Court's attention to the fact that all of the following remedies at law were available at the time this suit was filed:

1. Judicial Remedies

A. Writs of mandamus or prohibition relative to the enforcement of voting and representation provisions in existing legislation.

B. An authoritative interpretation by the Courts of the State of New York of the constitutionality of Section 203 Suffolk County Charter, and Sections 150 and 153 (4) of the County Law.

Section 203 provides:

> "Voting; quorum. Each supervisor shall have one vote. A majority of the whole number of the members of the board shall constitute a quorum. Except as otherwise provided by law, local laws and resolutions shall be adopted by a vote of not less than a majority of the total membership of the board. In case of a tie vote on any matter at any meeting of the board of supervisors the county executive shall have a casting vote, provided however, that he shall not have a vote as to any local law or resolution which provides a new form of government, for the county or changes the voting strength of the supervisors, or which changes the location of the county seat."

Section 150 of the County Law:

> "Board of Supervisors Constituted—These supervisors of the several cities and towns in each county, when lawfully convened shall constitute the Board of Supervisors of the County."

Section 153(4) provides in pertinent part:

> "Whenever in this chapter or other general, special or local law, the board of supervisors is authorized or required to act, and no proportion of the voting strength for such action is otherwise prescribed, such action shall be taken by the affirmative vote of a majority of the total membership of the board. . . ."

Unreported cases involving these principles:

> State of New York Supreme Court; Broome County, *Augostini et al* v. *Lasky et al; Monroe* County, *Goldstein et al* v. *Rockefeller et al;* Broome County, *Seamen et al* v. *Fedourich, et al;* Sullivan County, *Shilbury* v. *Board of Supervisors of County of Sullivan.*

C. An interpretation of the state constitution providing as follows: Article 9, Local Governments, Section 1, (Bill of Rights for Local Governments):

> "(a) Every local government, except a county wholly included within a city, shall have a legislative body elective by the people thereof. Every local government shall have power to adopt local laws as provided by this article."

2. Statutory Rights

A. The ordinary process of petitioning the Board of Supervisors to create a special committee to study reapportionment is available to Appellees. (See County Law 154, Section 2, 3, 4 and 5.)

"2. The board may from time to time create special committees. Any resolution creating a special committee shall specify the powers and duties of the committee and the number of its members. Each member of any special committee shall serve for the period specified in such resolution but in any event not longer than the term for which he shall have been elected as a supervisor."

"3. Members of all standing and special committees shall be appointed by the chairman of the board from its membership."

"4. Vacancies in standing and special committees shall be filled by the chairman of the board from its membership."

"5. The board may authorize committees to accept advice and counsel of citizens not members of the board."

B. A petition for referendum is a right available in Suffolk County. (See Suffolk County Charter, Section 2210.)

"2210. Petitions for referendum. Whenever in this charter a question is to be submitted to referendum of the electors of the county by petition, such petition shall be verified or authenticated in the manner provided in the election law with respect to designating petitions. All papers severally containing such requests and signed and so verified or authenticated when bound together and offered for filing, shall constitute one petition."

The election law referred to in Section 2210 is more fully described in County Law Section 102(2) as follows:

"2. The board of elections shall cause any such proposition to be submitted to the qualified electors of the county in the manner provided in the elec-

tion law. The method and manner of submission preparation and provision of ballots and ballot labels, use of voting machines, qualification of voters, correcting registers, and conducting the election, canvassing the result and making and filing the returns, and all other procedure with reference to the submission of any such proposition to be submitted to the electors of a county at a general or special election as provided by law. If a majority of the votes cast on any such proposition shall be in the affirmative, the resolution shall be approved. As amended L. 1951, c. 652, § 1; L. 1963, c. 431, eff. Jan. 1, 1964."

C. The modification of the Suffolk County Charter in order to provide for proper reapportionment in the county is a right available to the Appellees. (See Section 2303 the Suffolk County Charter);

"§ 2303. Amendment of Charter. This charter as an alternative form of government may be amended in accordance with the state constitution, applicable statutes and the provisions hereof."

The above statutory rights are available and have always been available to the Appellees subject to referendum. (see Municipal Home Rule Law, Section 24 as follows:)

"A local law subject to referendum on petition as provided in this section or in any other state statute, if not also subject to mandatory referendum, shall not take effect until at least forty-five days after its adoption; nor until approved by the affirmative vote of a majority of the qualified electors of the local government voting on a proposition for its approval if within forty-five days after its adoption there be filed with the clerk a petition protesting against such local *law, signed, and authenticated as herein required by qualified electors of such local government, registered to vote*

therein at the last preceding general election, in number equal to at least ten per centum of the total number of votes cast for governor at the last gubernatorial election in such local government." (emphasis supplied.)

D. The elected representatives of Appellees constituting the Board of Supervisors have the power to amend, repeal, and supersede local laws. The Appellees therefore have the added right to petition their elected representatives to institute immediately a temporary device of weighted voting or fractional voting or a combination of such alternatives. This is in accordance with County Law 153, Section 1 through 6 as follows:

"1. A power of the county, whether in terms vested in the county or in the board of supervisors shall, except as otherwise expressly provided, be exercised through a local law or resolution duly adopted by the board."

"2. A majority of the duly constituted membership of the board of supervisors shall constitute a quorum for the transaction of business, but a less number may adjourn."

"3. Each local law or resolution shall have a title prefixed concisely stating the contents."

"4. Whenever in this chapter or other general, special or local law, the board of supervisors is authorized or required to act, and no proportion of the voting strength for such action is otherwise prescribed, such action shall be taken by the affirmative vote of a majority of the total membership of the board. A roll call shall be taken and entered by the clerk in the minutes of its proceedings when required by law or upon request of any member of the board."

"5. All resolutions shall become effective upon their adoption or as otherwise provided by this chapter or other law or as specified in the resolution."

"6. Subject to the restrictions provided in this chapter or other law, the board of supervisors shall have power to amend, repeal or supersede any local law or resolution theretofore adopted."

E. When the Board itself institutes such a system it is subject to the approval by the voters at mandatory referenda in accordance with the Municipal Home Rule Law. (Laws of New York (1962) Chapter 36A)

The reapportionment of a local unit of government which derives its powers by delegation from a state legislature is essentially a legislative matter. Where the legislature fails or refuses to act, state and federal judiciary remedies at law cited above are available. In New York, actions have been brought in Albany County, Broome County, Monroe County and Erie County to determine the meaning of the statutory remedies in New York. These are actions in the state courts upon which no definitive judicial answer has as yet been made.

In the case at bar, Appellees have given no thought nor any weight to *any* of the rights available to them save the one they unsuccessfully sought in the Court below. They are asking this Court to apply constitutional principles in a precipitious and uncalled for manner. Courts should not use extraordinary power, nor should they consider alleged constitutional questions when the case may be disposed of satisfactorily otherwise; that is, by deference to statutory remedies readily available to them. The case at bar is an excellent example of a time, we respectfully suggest, that the

Supreme Court direct lower federal courts to refrain from getting into political controversies and to exercise judicial restraint.

We contend that the District Court below should have exercised judicial restraint and ruled that Appellees had plain and adequate remedies at law. In *Baker* v. *Carr, supra,* a three-judge court was convened under 28 U.S.C. section 2281 in the Middle District of Tennessee. The District Court dismissed the complaint which alleged that a Tennessee statute that had improperly apportioned the Tennessee General Assembly had unconstitutionally denied citizens equal protection. The Supreme Court held the dismissal was an error and remanded the cause to the District Court. Mr. Justice Brennan delivered the decision of the Court, and stated:

> "Tennessee has no initiative and referendum . . . the majority of the people of Tennessee have no *practical opportunity for exerting their weight at the polls* to correct the existing *invidious discrimination.* The majority of the voters have been caught up in a legislative straightjacket." (*ibid* at page 193)

However, there is no straightjacket in the case at bar because appropriate remedies do exist in New York State as we have shown above.

Justice Frankfurter's dissenting opinion in the *Baker* case raises another significant distinction. He anaylzes *Gomillion* v. *Lightfoot, supra,* as a case involving discrimination against the Negro's right to vote and sees it as a clear exception . . . "For here the controlling command of Supreme Law is plain and unequivocal." (*ibid* at page 285)

However, there is no clear "command" in the case at bar. There is no racial discrimination here.

There exists a long series of cases in which the Supreme Court, prior to *Baker* v. *Carr, supra,* had refused to restrict the states in the state's power to allocate electoral weight among the voting populations of their various subdivisions. Justice Frankfurter relied heavily on *Colegrove* v. *Green,* 328 U.S. 549 (1946) in his analysis.

Among those cases so cited by Justice Frankfurter, we invite the Court's attention to *Matthews* v. *Handley,* 179 F. Supp. 470 (1959) aff'd 361 U.S. 127 (1959) which has never been reversed, nor even distinguished, by the Supreme Court nor any Federal Court. In *Matthews, supra,* taxpayers alleged before a three-judge District Court that as citizens of Indiana they had a right to a properly apportioned legislature, which did not exist at the time of the passing of the State Income Tax Act; they, therefore, sought to have the act declared unconstitutional and further that the state officers be enjoined from collecting the tax.

The three-judge District Court granted defendants' motion to dismiss on the ground that Courts of Equity will not act when an adequate legal remedy exists, and Judge Grant's language is as follows:

> "Historically, since the dawn of Courts of Equity in our Anglo-American system of jurisprudence, it has been held that Courts of Equity will not act in such a circumstance as here when adequate remedies exist. Plaintiffs have an adequate legal remedy available. Plaintiffs are asking this Court to concern itself with a purely state political question. The plaintiffs have the power of the ballot to correct any unrealistic apportionment of the State Legislature which might exist." (*ibid* at page 471)

In the State of New York and in Suffolk County plain and adequate remedies existed in the state courts

and through the ordinary legislative processes on the local level. Appellees have a right to redress, but there is nowhere in the record any indication that any effort was put forth at any time to seek the redress by means of the remedies prescribed by law. This is no *Baker* v. *Carr* situation, for in that instance the voters of Tennessee had absolutely no recourse but in the federal courts. Also there is here no clear "command" as in the *Gomillion* v. *Lightfoot, supra* case where a broad racial question arose.

In *Gomillion v. Lightfoot, supra* a plan for redrafting municipal boundaries was struck down on a single issue: discriminatory treatment of a racial minority violating the Fifteenth Amendment, but the Supreme Court used language clearly limiting the power of the states to control municipal boundaries, and when quoted out of context, the following statement in *Gomillion, supra* has often been misapplied:

> "When a state exercises power wholly within the domain of state interest, is is insulated from federal judicial review. But such insulation is not carried over when a state power is used as an instrument for circumventing a federally protected right." (*ibid* at page 347)

This must refer to a federally protected right specifically being discussed in the prior paragraph:

> "If the allegations are established, the inescapable human effect of this essay in geometry and geography is to despoil colored citizens and only colored citizens of their theretofore enjoyed voting rights."

The case of *Glass* v. *Hancock, supra,* contains a fact situation that is more clearly analogous to our fact

situation than *Baker* v. *Carr, supra,* or *Gomillion* v. *Lightfoot, supra.* In *Glass*, a bill of complaint was filed in the Chancery Court of Hancock County, Mississippi by Hancock County citizens who alleged that the county board of supervisors' failure to redistrict violated the Equal Protection Clause of the Fourteenth Amendment. A general demurrer to the bill of complaint was sustained by the County Court on the ground that there was no equity on the face of the bill for the reason that there was a plain and adequate remedy at law. In the Mississippi case the citizens at no time requested their board of supervisors to redistrict the county, just as in our case there has been no petition for the establishment of a committee to establish reapportionment. In *Glass, supra,* the bill asked for injunctive relief which is an extraordinary remedy, yet there was no record that the ordinary remedies of petition and referendum were being utilized. Nowhere in the bill of complaint in *Glass, supra,* is it contended that the particular section of the Mississippi code failed to furnish an adequate remedy for the violation of the rights complained of nor had Plaintiffs there at any time exercised their rights under the Mississippi code. This is identical to the situation in the case at bar where the judicial remedies and legislative remedies are available and nowhere in the complaint was it contended that these failed to furnish a clear, adequate remedy at law.

CONCLUSION

If this Court should hold that it does not have appropriate jurisdiction to note this case for hearing and argument by reason of any procedural defect on appeal from a three-judge statutory Court, or for any other valid reason, Appellants respectfully request the Court to pass an Order allowing additional time for filing notice of and an appeal to the U.S. Court of Appeals for the Second Circuit. This request is made not as a concession that this appeal is improvidently made, but for the purpose of suggesting to the Supreme Court the interposition of an appropriately equitable procedural remedy which has been approved by the Court in many cases. The leading case is: *Oklahoma Gas & Electric Co. et al.* v. *Oklahoma Pacing Co. et al.*, 292 U.S. 386 (1934); citing *Gully* v. *Interstate Natural Gas Co.*, 292 U.S. 16 (1934); *Healey* v. *Ratta*, 289 U.S. 701, (1933).

It is submitted that the Supreme Court has jurisdiction, and it should hear this appeal and reverse the Court below with instructions to grant Appellants' Motion to Dismiss the Complaint. The questions herein are new, substantial and important to the continued

vitality and existence of local subdivisions of state government.

Respectfully submitted,

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